

11 Impact of the Penal Code and Other Statutes

PENAL CODE

Violations of the Penal Code (PC) are of interest to real estate licensees because such offenses may be committed by clients or by others with whom licensees come into contact. If there is doubt as to whether a transaction involves a crime, a licensee should obtain legal advice.

For the most part, grand (as opposed to petty) theft is committed when the value of the money, labor, or real or personal property taken exceeds four hundred dollars (\$400). Theft of certain farm crops, farm animals and real property severed from land is defined as grand theft at values below \$400. (PC 484, 487a through 487g, 488)

Some examples of real estate related crimes are:

1. Diversion of construction funds from the intended purpose; use of a false voucher to obtain construction loan funds. (PC 484b, 484c)
2. Copying without permission, and with intent to use, documents owned by a title company. (PC 496c)
3. Removal of a structure from mortgaged real property, or after a foreclosure sale, with intent to defraud or to injure the mortgagee or purchaser. (PC 502.5)
4. Fraudulent appropriating or secreting of trust funds by a broker or other fiduciary. (PC 506)
5. Failure by debtor, upon sale of property covered by a security agreement, to pay to the secured party the amount due under the security agreement (or the proceeds, whichever is less). (PC 504b)
6. Obtaining property from another by a threat to accuse that person or members of his or her family of a crime or to expose their secrets. (PC 518, 519)
7. Making or recording a deed, knowing the maker has no title; being a party to a fraudulent conveyance of land. (PC 531a)
8. Making or procuring a false financial statement to benefit oneself or another person in obtaining credit. (PC 532a)
9. Offering or giving parcels of real property by means of winning numbers at any drawing or with admission tickets, and collecting fees in connection with the land transfer. (PC 532c)
10. Giving a kickback of construction funds. (PC 532e)
11. Selling the same land twice to different persons. (PC 533)
12. Willful concealment by a married person of the necessity for concurrence of a spouse in the sale or mortgaging of land. (PC 534)
13. A broker or agent who "holds out" on a principal, or renders a principal a false accounting, commits a misdemeanor. (PC 536, 536a)
14. Except for posting legal notices, placing advertising signs on public or private property without permission. (PC 556, 556.1, 556.2)
15. Bribing a lender to obtain credit; accepting the bribe. (PC 639, 639a)

16. Signing the name of another person, or of a fictitious person, without authority to do so; falsely making, altering, forging or counterfeiting documents such as leases, deeds or checks; passing such documents as true and genuine, with intent to defraud. (PC 470, 473)

UNLAWFUL PRACTICE OF LAW

Sections 6125 and 6126 of the California Business and Professions Code prohibit the practice of law by persons who are not members of the State Bar.

In 1943, in *People v. Sipper* (61 CA 2d 844), the California District Court of Appeal stated that the practice of law is the doing and performing of services in a court of justice in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. The court recited the larger traditional definition that includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matters may not be pending in a court.

In the Sipper case, a married couple had asked the real estate broker “to make out a paper to protect Mrs. Hetman for the money” which they had borrowed from her in order to pay off the indebtedness on their real property. The defendant broker proceeded to prepare a trust deed, and later a mortgage. He charged \$15 for his services, later reducing the charge to \$10.

The appellate court held that the trial jury was justified in concluding that the defendant broker undertook to, and did, advise his clients as to the kind of legal document that they should execute in order to secure the loan. He made a charge which clearly indicated “...that he considered he was called upon to do something more than the mere clerical work of typing in certain furnished information on a blank form.” This was practicing law.

Significantly, the court stated that if the defendant “...had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license.”

In discussing this problem, an authoritative encyclopedia of California law, *California Jurisprudence*, states that, “...an established business custom sanctions the activities of real estate and insurance agents in drawing certain agreements in business transactions in which they take part in their respective professional capacities.” The editors then quoted an article by Robert L. Lancefield (29 California Law Review 602) which stated: “While these actions are technically within the usual definition of practice of law, they are generally recognized as proper where:

- the instrument is simple or standardized;
- the draftsman or intermediary does not charge any fee for such work (other than his regular commission for the transaction); and,
- the drafting is incidental to his other activities in the transaction.”

Selection and use of a form by the broker may sometimes require a lawyer’s help.

BUSINESS AND PROFESSIONS CODE

The Department of Real Estate publishes the *Real Estate Law*, a book which includes the many Business and Professions Code Sections which regulate real estate licensees.

CIVIL CODE

The Civil Code (CC) proscribes various acts relative to real property sales contracts. A real property sales contract (sometimes called a contract of sale or a land installment contract) is defined as an agreement to convey title to land upon satisfaction of specified conditions set forth in the contract and which does not require conveyance within one year of formation of the contract.

Some examples of violations involving contracts of sale are:

1. Without the buyer's consent, the seller under an unrecorded contract of sale encumbers the land in an amount exceeding the present contract balance. (CC 2985.2)
- b. While there is a payment due an obligation secured by the land, a seller under a contract of sale appropriates a payment received from the buyer to any purpose except payment on that obligation. This does not apply to any difference between the payment received by the seller and the amount due on the seller's obligation. (CC 2985.3)
- c. Failure by the seller under a contract of sale to apply to those purposes pro rata tax and insurance payments received from the buyer. (CC 2985.4)

(The Department of Real Estate's *Real Estate Law* book includes these and other Civil Code sections which are of interest to real estate licensees.)

CORPORATIONS CODE

Some of the activities which constitute crimes under the Corporations Code relate to the sale of securities. A conspiracy to violate the California Corporate Securities Act is a crime. (PC 182; Corporations Code Section 25540)

The sale of fractionalized interests in promissory notes secured by deeds of trust may result in the sale of corporate securities subject to qualification or exemption with the California Department of Corporations. Without such qualification or exemption, the sales are illegal and the broker or offeror could be convicted of a crime.

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